STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED June 12, 2003
v	No. 239894 Wayne Circuit Court
ANDREW SIMONI, Defendant-Appellee.	LC No. 01-007273

Before: Talbot, P.J., and Neff and Kelly, JJ.

PER CURIAM.

The prosecution appeals as of right an order dismissing the charges of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v), and possession of a firearm during the commission of a felony, MCL 750.227b, which resulted from the granting of defendant's motion to suppress evidence. We reverse and remand for further proceedings.

Defendant was arrested and charged with felony-firearm and possession of less than twenty-five grams of cocaine as a result of evidence obtained during a consensual search of defendant's motel room. The facts leading to defendant's arrest are a little unusual. A caller who identified himself as Andrew Simoni called 911 to report that he and another man had broken into a house and stolen guns and drugs. The caller was concerned that his companion in crime would report him to police, so he called them first. The caller was told to wait by the phone for the police who showed up shortly thereafter. Defendant matched the description given by the caller and he identified himself as Andrew Simoni and recounted the same facts as those told to the 911 operator.

Defendant then cooperated with police by indicating that his partner was in a motel room defendant had rented. Defendant went with police to the motel and the partner was lured out of the motel room. Defendant then gave police permission to search the room, and the guns and drugs were found resulting in defendant's arrest and the charges at issue.

Defendant moved to suppress the evidence, and after taking testimony, the trial court granted defendant's motion for the reason that defendant was in custody but was not given his *Miranda*[1] warnings before the request for consent to search was made.

On appeal, the prosecution concedes that defendant was in custody at the time the request to search was made but argues that the trial court confused the nature of the protections given by the Fourth Amendment right against unreasonable searches and seizures and the Fifth Amendment right against self-incrimination when it found the consent invalid for the reason that no *Miranda* warnings were given although defendant was in custody. We agree.

The application of a constitutional standard to uncontested facts is reviewed de novo. *People v Stevens (After Remand)*, 460 Mich 626, 631; 597 NW2d 53 (1999).

Fifth Amendment protections do not apply to a request for consent to search. *People v Marsack*, 231 Mich App 364, 374-376; 586 NW2d 234 (1998). *Miranda* warnings are required to be given only when the accused is subject to custodial interrogation. *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001). Interrogation means express questioning and any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. *Marsack, supra* at 374. As requesting consent to search is not likely to elicit an incriminating statement, such questioning is not interrogation. *Id*. at 375. A search pursuant to consent could reveal incriminating evidence, but that evidence is real and physical, not testimonial. *Id.*

Therefore, the request made of defendant to search his motel room did not constitute a custodial interrogation and did not trigger the requirement to administer *Miranda* warnings. The failure of the police to read defendant *Miranda* warnings did not invalidate the search. The correct line of inquiry is whether the consent to search was voluntarily given under the totality of the circumstances.

The right of the people to be free from unreasonable searches and seizures is guaranteed by both the United States and Michigan constitutions. US Const, Am IV, and Const 1963, art I, § 11. Searches and seizures conducted without a warrant are unreasonable per se, subject to several specifically established and well-delineated exceptions. *Schneckloth v Bustamonte*, 412 US 218; 93 S Ct 2041; 36 L Ed 2d 854 (1973); *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996).

One established exception to the general warrant and probable cause requirements is a search conducted pursuant to consent. *Schneckloth, supra* at 219. Whether consent to search is freely and voluntarily given is a question of fact based on an assessment of the totality of the circumstances. *Id.* at 227; *People v Reed*, 393 Mich 342, 362-363; 224 NW2d 867 (1975).

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Some of the factors considered by courts in determining the voluntariness of a consent to search include:

> [W]hether defendant was a youth; whether defendant was uneducated or conversely, well versed in the law; whether the information on which the investigation was based was unlawfully obtained; whether defendant was given his *Miranda* rights; the length of the detention and the length and nature of the questioning; the use of physical threats; the familiarity of the surroundings; defendant's freedom of movement during the questioning or search; defendant's cooperation or lack of cooperation in the search; the number of officers present during the interview and search; whether the officers told defendant that he did not have to consent to the search; and whether the officers suggested that defendant give them the thing seized. See *Schneckloth, supra* at 226; *United States v Hearn*, 496 F2d 236, 243 (CA 6 Tenn, 1974). [*United States v Louis*, 679 F Supp 705, 707-708 (WD Mich, 1988).]

The fact that the defendant is in custody is not itself sufficient to render consent involuntary. *United States v Jordan*, 399 F2d 610, 614 (CA 2, 1968).

We have reviewed the record of the evidentiary hearing on the motion to suppress and find that it contains virtually no evidence of the existence or non-existence of the *Louis* factors which would permit us to make a determination of voluntariness under Fourth Amendment standards. The lack of record evidence requires that we remand this case for a determination by the trial court as to the voluntary nature of defendant's consent to search the motel room.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Kirsten F. Kelly